

# Is Criminal Justice a Casualty of the Bush Administration's "War on Terror"?

By Michael Greenberger

On October 27, 2003, Judge Lynn N. Hughes of the Southern District of Texas overturned a 1983 conviction of a U.S. citizen and alleged terrorist, Edwin P. Wilson, for selling explosives to Libya. *United States v. Wilson*, No. 4:82-CR-139 (S.D. Tex. Oct. 27, 2003), available at <http://www.txs.uscourts.gov/cgi-bin/notablecases/notablecases.pl?action=chome&caseno=4:82-CR-139>. Judge Hughes's opinion focuses extensively on the high level of deceit in certain Department of Justice (DOJ) trial practices during those early days of the fight against terrorism. The opinion should be highly instructive to today's DOJ, which has employed a host of extraordinary prosecution tactics in fighting its current "War on Terror," all of which may very likely aggravate the constitutional problems identified in the *Wilson* decision, rather than effectively combat terrorism.

Wilson's conviction occurred at the height of American outrage against the Libyan government for its support of terrorist organizations. Wilson, a former CIA officer, was convicted of betraying the United States by selling explosives to Libya after his retirement, despite his assertion, both before and at the time of his conviction, that he had been acting under the direction and authority of the CIA in his dealings with Libya. In Wilson's recent motion to overturn his conviction, he compellingly demonstrated that at his initial trial, the government had withheld records within its possession documenting at least forty occasions where Wilson had worked for the CIA in a capacity completely consistent with his defense. Reviewing the evidence, Judge Hughes, a Reagan administration appointee, concluded that a continuing relationship between Wilson

and the CIA did exist after Wilson's retirement, and that federal prosecutors knowingly failed to disclose material and exculpatory information and otherwise used false testimony to undermine Wilson's defense.

Judge Hughes commented:

In the course of American justice, one would have to work hard to conceive of a more fundamentally unfair process with a consequentially unreliable result than the fabrication of false data by the government, under oath by a government official, presented knowingly by the prosecutor in the courtroom with the express approval of his superiors in Washington.

This "fundamentally unfair process" was successfully employed against Wilson at his trial, despite his entitlement to all constitutional protections inherent in a federal criminal trial. *Wilson* should serve as a warning to those examining the Bush administration's manifold efforts under the guise of Presidential War Powers to block many of the protections that ensure just trial results.

## "Enemy Combatants"

The first of these deprivations arises under the DOJ's view that a U.S. citizen may unilaterally be declared by the president to be an "enemy combatant" and thus be incarcerated in a military prison without any right to counsel, prior judicial process, or judicial review of his or her status. See *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) (hereinafter *Hamdi III*), petition for cert. filed, No. 03-6696 (U.S. Oct. 1, 2003); *Padilla ex rel. Newman v. Rumsfeld*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), *aff'd in part, rev'd in part*, No. 03-2235 (2d Cir. Dec. 18, 2003). See Also *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002). John

Walker Lindh, Yaser Esam Hamdi, and Jose Padilla are all U.S. citizens who have been designated unlawful enemy combatants by the president due to their ties to terrorist activities against the United States. The government alleges that Lindh and Hamdi were both found on the battlefield in Afghanistan taking up arms against the United States. Padilla, an alleged member of al Qaeda, was arrested in Chicago and detained on suspicion of scouting targets within the United States for a radiological bomb strike.

Lindh, one of the first so-called enemy combatants, was charged in a federal district court in December 2001 on ten counts of criminal conspiracy, including conspiracy to murder nationals of the United States; conspiracy to provide material support and resources to foreign terrorist organizations; and conspiracy to provide and providing services to foreign terrorist organizations. As a criminal defendant, Lindh had counsel and the full array of constitutional protections. Despite allegations of his deep involvement with foreign terrorist groups, Lindh, with the aid of able defense counsel, substantially undercut the government's case and negotiated a quite favorable plea agreement, under the circumstances. The government's subsequent treatment of Hamdi, on the other hand, was completely inconsistent with that given to Lindh—considering the alleged facts in these two cases are virtually identical. Hamdi is being held in a military prison indefinitely, incommunicado and without access to counsel, while the government claims he has no right to have his status judicially reviewed. The same is true for Padilla.

Interestingly, two conservative courts substantially scaled back the govern-

ment's enemy combatant theory. Both the Fourth Circuit and Chief Judge Mukasey of the Southern District of New York, another Reagan appointee, recognized that deference should be given to the president's decisions in matters of war; but the Fourth Circuit in *Hamdi III* noted that "judicial deference to executive decisions made in the name of war is not unlimited." In addition, both courts unequivocally held that judicial review of Hamdi's and Padilla's habeas petitions were the appropriate mechanisms for challenge of their detentions. The *Hamdi III* court also limited its decision by sanctioning only detentions of U.S. citizens found on the field of battle and expressly refusing to decide the lawfulness of detaining U.S. citizens arrested elsewhere, like Padilla (arrested in Chicago).

In *Padilla*, Chief Judge Mukasey held that all enemy combatants, wherever arrested, are entitled to counsel. He recognized that although habeas corpus statutes do not explicitly provide a right to counsel, 18 U.S.C. section 3006A(a)(2)(B) authorizes a court to appoint counsel for a habeas petitioner if the court determines that "the interests of justice so require." He further noted that petitioners filing for habeas review on appeal from a trial proceeding generally have already had the benefit of counsel. However, in the case of enemy combatants who have been imprisoned (but not tried or even charged), he reasoned that the lack of counsel puts them at a severe disadvantage. Without access to counsel, he concluded, habeas corpus relief in these circumstances would be "an empty remedy."

On appeal, the Second Circuit in a 2-1 vote affirmed Chief Judge Mukasey's conclusions on jurisdiction and other issues, but disagreed with his finding that the president had exclusive authority as commander in chief to arrest and detain, as an enemy combatant, a U.S. citizen on U.S. soil, as was the case in *Padilla*. *Padilla v. Rumsfeld*, No. 03-2235, 2003 U.S. App. LEXIS 25616 (2d Cir. Dec. 18, 2003). To the contrary, the court found that, at a minimum, the president would need express congressional authorization for this process and that he had no such authority in this case, either inherently or pursuant to any existing act of Congress. Having reached this conclusion, the majority

had no need to address whether Padilla was entitled to have access to counsel. However, even the dissenting judge would have affirmed Chief Judge Mukasey's ruling that enemy combatants are entitled to counsel, stating, "Padilla's right to pursue a remedy through the writ would be meaningless if he had to do so alone." See *Padilla*, No. 03-2235, 2003 U.S. App. LEXIS 25616 (J. Wesley dissenting).

In stark contrast to Chief Judge Mukasey, the Fourth Circuit did not permit Hamdi to have access to counsel because he was lawfully captured "in a zone of active combat operations in a foreign country." In her dissent to a denial of en banc review, Judge Diana Gribbon Motz of the Fourth Circuit criticized the *Hamdi III* panel's decision as a "rubberstamp of the Executive's unsupported [enemy combatant] designation lack[ing] both the procedural and substantive content of a [meaningful] review." She added, "The Executive's treatment of Hamdi threatens the freedoms we all cherish, but the panel's opinion sustaining the Executive's action constitutes an even greater and more subtle blow to liberty."

As of this writing at the end of December 2003, a petition for writ of certiorari in the U.S. Supreme Court is pending in *Hamdi III*. The government continues to assert before the court that U.S. citizens arrested as enemy combatants and imprisoned in military brigades have no right to counsel, due process, or judicial review of their status. However, on the day its opposition to Hamdi's petition for certiorari was due, the government announced, "as a matter of discretion and military policy" it would allow Hamdi access to counsel. This is probably due to the mounting public criticism of DOJ tactics and the Court's grant of certiorari in a case involving foreign detainees at Guantanamo Bay. See *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), cert. granted, 2003 U.S. LEXIS 8204, 72 U.S.L.W. 3327 (Nov. 10, 2003). Despite its sudden largesse, the government still maintains that Hamdi is not entitled to counsel under domestic or international law and that this grant of access to counsel should not be treated as precedent.

#### Material Witness Detentions

Another tactic employed by the DOJ on a widespread basis after September

11 is the imprisonment of individuals for the purpose of securing their testimony as a material witness before a grand jury at some indefinite future date. In *re Application of the United States for a Material Witness Warrant*, 213 F. Supp. 2d 287, 300 (S.D.N.Y. 2002). These individuals are being held indefinitely under the federal material witness statute (18 U.S.C. § 3144), but they are not charged with any crime, nor is there any probable cause to suspect they have committed a crime. The practice of detaining individuals pursuant to a material witness warrant pending a criminal trial—as opposed to the convening of a grand jury—is well established. See, e.g., *Hurtado v. United States*, 410 U.S. 578 (1973). However, a pretrial material witness may not be "detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition . . . pursuant to the Federal Rules of Criminal Procedure." Rule 15 particularly provides that a detained material witness may be deposed "to preserve testimony for trial" in exchange for a release, ensuring that pretrial detention periods will be limited.

In *United States v. Awadallah*, 202 F. Supp. 2d 55 (S.D.N.Y. 2002), the government acknowledged that a deposition is available to material witnesses pending a trial, but it contended that the deposition alternative is not available to grand jury material witnesses because Rule 15 by its terms does not apply to the grand jury context. Judge Shira Scheindlin of the District Court for the Southern District of New York agreed with the government on this point and ruled, *inter alia*, that the consequent elimination of a deposition alternative for grand jury material witnesses who cannot be released on bail makes their indefinite detention violative of the Fourth Amendment. Accordingly, she read the federal material witness statute as not applying to the grand jury context to avoid this constitutional problem. However, on appeal, the Second Circuit reversed, holding that indefinite imprisonment of a grand jury material witness without deposition is not only authorized by the federal material witness statute but also consistent with the Fourth Amendment. *United States v. Awadallah*, 349 F.3d 42 (2d Cir. 2003).

Osama Awadallah, a Jordanian citizen

and lawful permanent resident of the United States, was arrested on September 21, 2001, at his home in San Diego as a material witness pending a grand jury investigation of the September 11 terrorist attacks. For nineteen days he was held under harsh maximum security conditions in three separate prisons across the country. He testified in shackles before a grand jury in New York and was indicted for allegedly testifying falsely at the grand jury proceedings; thus, he remained in prison. After eighty-three days as a prison inmate, he was finally released on bail as a result of, *inter alia*, strong family ties to the United States. Judge Scheindlin dismissed the indictment on the ground that the alleged perjurious statement was tainted by the highly coercive nature of his initial lengthy and unlawful imprisonment with no probable cause that he had committed a crime.

In appealing Judge Scheindlin's decision to the Second Circuit, the government shifted its position on the availability of a deposition in lieu of indefinite detention for grand jury material witnesses. It argued that grand jury witnesses *may* obtain a deposition in some cases but that one had not been *required* in Awadallah's case. The Second Circuit accepted this argument, making a remarkable leap: although the federal material witness statute may be read as providing a deposition alternative to lengthy incarceration for grand jury material witnesses without probable cause, Awadallah was not entitled to a deposition because he had had two unsuccessful bail hearings before testifying. Even though bail had been denied both times, the court found his indefinite detention reasonable under the Fourth Amendment because the courts at least had had opportunities to contemplate his release. Thus the Second Circuit ignored the express terms of the federal material witness statute, which as part of the Bail Reform Act favors release over detention in the absence of probable cause and gives a material witness a second remedy of speedy deposition if he cannot obtain release on bail. The Second Circuit's startling conclusion essentially substitutes the mere *availability* of a bail hearing for the statute's express provision of either a deposition or release on bail to avoid a lengthy incarceration without probable cause. The court thereby fully sanctioned the DOJ's tactic of arresting

and indefinitely imprisoning persons without probable cause until the convening of a grand jury.

### Denial of Access to Exculpatory Evidence

The final DOJ practice addressed here has shades of *United States v. Wilson*, *supra*: whether the president, acting pursuant to his Article I War Powers, may deprive a defendant accused in a federal court of capital crimes of access to exculpatory evidence to which he would otherwise be entitled under the Sixth Amendment. *United States v. Moussaoui*, 2003 U.S. Dist. LEXIS 17253 (E.D. Va. Oct. 2, 2003), *notice of appeal filed*, No. 03-4792 (4th Cir. Oct. 7, 2003).

Zacarias Moussaoui, an admitted member of al Qaeda, was arrested one month prior to the September 11, 2001, attacks. The government alleges that until the time of his arrest, Moussaoui participated in planning the September 11 attacks. He is charged with six counts of conspiracy, and the government is seeking the death penalty on four of the counts. Moussaoui moved for access to three al Qaeda detainees being held abroad by the United States, asserting that these individuals, especially the suspected coordinator of the September 11 attacks, would exonerate him of conspiracy charges. The government, however, argued that the Sixth Amendment does not give defendants an absolute right to access exculpatory witnesses when it would jeopardize national security.

Judge Brinkema of the Eastern District of Virginia rejected the government's argument and ordered Moussaoui be given limited access to the detainees. Reminding the government that it "assumed the responsibility of abiding by well-established principles of due process" when it brought criminal charges in federal court, Judge Brinkema found the testimony of the witnesses in question to be "both material and exculpatory." The government, however, took an immediate interlocutory appeal to the Fourth Circuit, which dismissed it for lack of ripeness, holding the government never clearly stated it would not obey Judge Brinkema's order. On remand, the government then informed Judge Brinkema it would not comply with the order. Recognizing that a sanction would

be imposed upon it for its lack of cooperation, the DOJ ironically joined Moussaoui in seeking dismissal of the case. This strategy was clearly designed to eliminate any jurisdictional defects in a future appeal to the Fourth Circuit—a court-ordered dismissal would ripen its challenge to the underlying order.

Judge Brinkema, however, refused the dismissal request, instead sanctioning the government by eliminating the death penalty as a potential punishment in the criminal proceeding and barring the government from arguing or offering evidence that Moussaoui was linked to the September 11 attacks. With these sanctions, the court stated it was "satisfied that testimony from the detainees at issue would [no longer] be material to the defense" and Moussaoui's constitutional right to a fair trial would not be undermined. Seeking restoration of the death penalty and September 11-related evidence, the government has taken a second interlocutory appeal to the Fourth Circuit rather than proceed with the trial.

### A Lesson in Time

Judge Hughes's order vacating a two-decade-old wrongful conviction in *United States v. Wilson* demonstrates the dangers of overzealous prosecution under the guise of fighting terrorism. In spite of having representation of counsel and complete access to the panoply of constitutional rights afforded criminal defendants, including judicial review, Wilson was otherwise unable to prevent the DOJ's use of deceitful tactics to gain a questionable (but at the time highly popular) conviction. Now the DOJ is seeking to separate detainees from counsel, process, and judicial review or, otherwise, to imprison them indefinitely and coercively without probable cause. The government thereby makes it more likely that injustices will be perpetuated in its zeal to find terrorists. *Wilson* is a warning that, if unchecked, the denial of fundamental constitutional protections not only increases the potential for injustice but also renders our criminal justice system itself a casualty of the "War on Terror."

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